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No. 3

In the

Supreme Court of the United States

OCTOBER TERM, 1961

HORACE HART

Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM VANDERCREEK,
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August, 1961

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UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Horace Hart prays that a writ of certiorari issue to review a case pending in the United States Court of Appeals for the Fifth Circuit. The United States District Court upheld federal jurisdiction under *28 U.S.C. § 1332(a)* and has entered final judgment.

OPINION BELOW

The judgment of the United States District Court for the Northern District of Texas (Tr. pp. 181-182; Appendix A, *infra*) is not reported.

JURISDICTION

The judgment of the District Court was entered on June 16, 1961. (Tr. pp. 181-182; Appendix A, *infra.*) Appeal was duly perfected to the Court of Appeals and docketed therein on August 24, 1961. (Tr. pp. i, 193, 197.) The jurisdiction of this Court is invoked under *28 U. S. C. § 1254(1).*

QUESTIONS PRESENTED

1. Does Respondent-Insurer's diversity action to set aside a $910.00 State workmen's compensation award satisfying the jurisdictional amount where the injured employee counterclaimed for only $6,310.00 and claims only $6,310.00 in his state court suit?

2. Should federal courts abstain from exercising diversity jurisdiction in favor of competent state courts where the exercise of federal jurisdiction defeats both federal and state legislative policies?

STATUTES INVOLVED

28 U. S. C. § 1332 (In relevant part):

> "§ 1332. Diversity of Citizenship; amount in controversy; costs.
>
> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between * * *."

Texas Civil Statutes(Vernon 1984, Supp. 1960), Art. 8307, Sec. 5; Art. 8307a; Art. 8306 (set out Appendix H, *infra*).

STATEMENT

The Respondent compensation insurer instituted the present proceedings to set aside a $910.00 award of the Texas Industrial Accident Board alleging that the Petitioner-employee's claim before the Board exceeded $10,000.00. *(The relevant pleadings are set out in the Appendices, infra.)* The injured employee (pro se) filed a general claim for compensation with the Board and did not specifically claim more than $10,000.00 (Tr. p. 177). In the Respondent-insurer's federal suit the Petitioner-employee counterclaimed for $6,310.00 (Tr. pp. 6-10). The Petitioner-employee also filed suit in state court to set aside the Board's award and to claim $6,310.00 compensation. The Respondent-insurer filed a plea in abatement to the state action. (Appendix E, *infra.*) Although the Petitioner-employee challenged the jurisdiction of the federal court and denied that the amount in controversy exceeded $10,000.00 exclusive of interest and costs (Tr. pp. 5-10), trial proceeded in federal court resulting in judgment in favor of the Petitioner for *only* $1,224.00 plus costs (Tr. pp. 181-182). The Petitioner-employee's state court suit is still pending; he lost the race to the court house.*

Petitioner-employee duly appealed to the United States Court of Appeals for the Fifth Circuit and now seeks Writ

*Board issued award on June 21, 1960; Respondent's federal suit was filed on June 23, 1960—before Petitioner's counsel was even aware of award. (Tr. pp. 2, 178, 179.)

of Certiorari prior to judgment by the Court of Appeals for the reasons that follow.

REASONS FOR GRANTING THE WRIT

Summary

Certiorari should be granted before judgment because of the direct and immediate effect the decision will have in determining federal jurisdiction over literally hundreds of workmen's compensation proceedings. These workmen, because of the very purpose of comepnsation laws, are especially entitled to an expeditious and authoritative disposition of the vital jurisdictional issues presented herein. Not only will this case, when coupled with *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348*, become perhaps the most significant decision to be decided by this Court on the basic question of jurisdictional amount, but the case in large measure will decide the necessity for remedial legislation. This Court expressly recognized the possible need for congressional action in the *Horton* decision.

Additionally, and conceivably of even greater future impact, this case presents important questions of federal abstention.

I. The case pending below involves vitally important questions of federal jurisdiction which directly and immediately affect literally hundreds of workmen's compensation cases and which will determine the need for remedial congressional action.

A. *Case is of imperative public importance.*

Although the case pending below unquestionably will determine the extent of federal jurisdiction over hundreds of

workmen's compensation proceedings,[1] and presents jurisdictional matters of broad magnitude. Beyond such considerations, Petitioner requests Certiorari before judgment because of two factors. First, the jurisdictional facts of the case below illustrate the problems of applying the rule of *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348*, that are raised in Horton's Petition for Rehearing. These problems can be resolved authoritatively only by this Court. Second, further delay in disposing of the instant jurisdictional problems serves to frustrate the very purpose of workmen's compensation proceedings—the prompt, expeditious, and inexpensive determination of their claims. To amplify, the employee's preference for state court and the compensation insurers preference for federal is not due to an academic difference over federal-state relations. As the Court may have surmised, the preference is based on the financial fact that if the injured employee is permitted to try his state-created claim for compensation in his state court he will generally obtain a more substantial and expeditious recovery.[2] We wish to infer no criticism of insurance counsel for engaging in a race to the forum; indeed if federal jurisdiction is to be made a game of chess one should not chastise a master. Each year

---

[1]2,147 Texas Workmen's Compensation cases clogged the federal district courts in 1957. Sen. Rep. No. 1830, 85th Cong. 2d Sess. 8 (1958); set out in relevant part, Appendix G, *infra*.

[2]In the Eastern District of Texas in only 3 cases out of 815 disposed of for the period July 1, 1956 to March 7, 1960, was the employee's recovery over $10,000. Of these 815 cases, in 755 cases the recovery ranged between $18.95 and $5,000. Data taken from "List of Workmen's Compensation Cases for Period July 1, 1956 through March 7, 1960." Report of Clerk, United States District Court for the Eastern District of Texas, Tyler, Texas.

Another factor in depressing settlement values of compensation suits in the federal courts is delay. At present the state dockets are generally more current.

some 60,000 plus injured workmen file claims before the Industrial Accident Board; some 8,000 notices of appeal from the Board's awards are filed.[3] These citizens are entitled to know the rules for determining federal jurisdiction which have been in a state of quandary ever since the 1958 amendments to the judicial code. [*28 U. S. C. §§ 1332, 1445(c).*] If this Court does not act now the ultimate disposition of the matter could easily extend for another year—for a total of over four years.

B. *The upholding of federal jurisdiction in case pending below impinges upon the Constitutional Right of Congress as recognized by this Court in Cary v. Curtis, 3 How. 236, and conflicts squarely with the rule of McNutt v. General Motors Accept. Corp., 298 U. S. 178.*

Congress has chosen not to grant diversity jurisdiction to the federal district court unless the matter in controversy exceeds $10,000.00 exclusive of interest and costs. From the time the Respondent-insurer's complaint was filed through entry of the $1,224.00 judgment, the case below *never* presented an actual controversy over more than $6,310.00. To uphold jurisdiction would be to reduce the jurisdictional requirement of the matter in controversy to a mere pleading

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[3]Report of Industrial Accident Board of Texas for the Fiscal Year ending

	August 31, 1957	*id. 1958*	*id. 1959*
Number of Claims Handled	63,934	60,755	60,060
Number of Awards Issued	8,467	8,192	7,888
Notices of All Cases Disposed of in Court	4,996	5,112	4,620

fiction.[4] Such a recourse conflicts with Constitutional principles long recognized, and enforced, by this Court. In *Cary v. Curtis, 3 How. 236, 245*, this Court stated:

> "The judicial power of the United States, although it has its origin in the constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of congress, who possess the sole power of creating the tribunals (inferior to the supreme court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely."

The Respondent-insurer's form book allegation that the amount in controversy exceeded $10,000 was denied by the Petitioner. There is not one shred of evidence in the entire record to support the Respondent's allegation. The upholding of jurisdiction is in direct conflict with *McNutt v. General Motors Accept. Corp., 298 U. S. 178, 190:*

> "Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground."

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[4] In the famous case of Livingston v. Jefferson, Fed. Cas. No. 8411 (CC D Va. 1811), Marshall, sitting as Circuit Justice, refused to uphold the use of a pleading fiction to support venue of a local action.

"It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction."

See McNutt v. General Motors Accept. Corp., 298 U. S. 178.

C. *The upholding of federal jurisdictional amount in the case pending below because the defendant-employee (who claimed less than $10,000) could have claimed more than $10,000 conflicts with applicable decisions by this Court.*

This Court in *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348*, permitted a plaintiff to affix jurisdiction by correctly prophesying what the defendant would seek under his counterclaim. In effect, the naked allegation of jurisdictional amount *suspends* the determination of federal jurisdiction until the defendant affirmatively reveals the amount he seeks under his counterclaim. The *Horton* case goes no further. The foible of tentatively predicating jurisdictional amount on a conjectural sum that the defendant may claim is well illustrated here. The Petitioner-defendant chose to claim only $6,310, the amount supported by his medical testimony. There is no rule requiring a defendant to puff-up the amount of his claim so that the plaintiff's choice of the federal forum can be maintained. Contrawise it is well established that a party may claim less than $10,000 to avoid federal jurisdiction. *St. Paul Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294:*

> "If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount * * *."

If the case below be upheld, the plaintiff with a claim below the jurisdictional amount could always come into federal court so long as a potential claim existed that *could* involve more than the jurisdictional amount. A plaintiff should not be able to adopt the value of the defendant's potential claims

simply because the principle of *res judicata* would bar defendant from later asserting them if they are not raised in the instant suit. To hold as the district court below is to give consideration to the collateral effect of the potential judgment, violating one of the cardinal rules applicable to the computation of the amount in controversy. *Elgin v. Marshall, 106 U. S. 578* (effect of *res judicata* may not be considered in determining jurisdictional amount); *Healy v. Ratta, 292 U. S. 263* (object of the suit does not embrace matter collateral or incidental to issue raised by pleading). See *1 Moore's Federal Practice (1960)* ¶*0.91*[*2*]. Judge Dobie stated the rule as follows:

> "The amount in controversy in the United States District Court is always to be determined by the value to the plaintiff of the rights which he in good faith asserts in his pleading that set forth operative facts which constitute his cause of action. A counterclaim should play no part in the determination of the amount in controversy. And only the value of right directly in issue in the suit in question not the collateral effect of the judgment can be considered in making up the necessary jurisdictional amount." *Dobie on Federal Jurisdiction and Procedure, Sec. 56 (1928).*

II. The case pending below involves the divergent principles of the federal abstention doctrine and of Meredith v. City of Winter Haven, 320 U. S. 228, which only this Court can resolve.

The exercise of federal jurisdiction over Texas workmen's compensation suits serves to defeat both the federal policy

to give the injured workman the choice of forum[5] and the state policy to have the suit tried in the county where the injury occurred.[6]

Albeit the granting and continuation of diversity jurisdiction is clearly a matter for Congress, still under appropriate circumstances the federal courts are not compelled to always exercise their power. Thus under the doctrine of *forum non conveniens*[7] this Court approved the dismissal of a suit within the statutory grant of federal jurisdiction. *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 507:*

> "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment."

And in *Louisiana Power & Light Co. v. City of Thibodaux, 360 U. S. 25*, this Court gave impetus to the concept that federal courts may stay their proceedings pending disposition of issues to be raised in state courts. Moreover, even the reasoning of the Court in *Meredith v. City of Winter Haven, 320 U. S. 228, 237*, would seemingly support dismissal of this state workmen's compensation proceedings:

> "No litigation is pending in the state courts in which the questions here presented could be decided. We are

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[5] See Sen. Rep. No. 1830, 85th Cong. 2d Sess. (1958); Appendix G, *infra*; see also extracts from Congressional Record, Appendix F, *infra*.

[6] Texas Civil Statutes (Vernon, 1948; Supp. 1960) Art. 8307a; set out Appendix H, *infra*.

[7] The doctrine now, of course, is largely governed by 28 U. S. C. §1404.

> pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess."

Since dismissal of the federal action (as distinguished from mere staying) will depend largely upon the intensity of the federal policy, the statements contained in the Senate Report are unusually significant.

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standard Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State Court or the federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act—that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court." [*Sen. Rep. No. 1830, 85th Cong., 2nd Sess. 9 (1958)*; see Appendices F, G, *infra.*]

Although, as noted in *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348, 352*, the Senate Report shows that 25 out of 2,147 Texas Workmen's Compensation cases for the year 1957 had been originally filed by the insurance companies, the failure of Congress to exclude original filings by insurers

does not diminish the policy for abstention. Congress could well have thought that the 25 actions involved instances where the insurer's cause of action, without reference to the employee's counterclaim, involved more than $3,000 (the then jurisdictional amount). Under the *Horton* rule jurisdictional amount can be satisfied where the defendant employee will actually counterclaim in federal court for more than $10,000.00. Petitioner submits the federal court should abstain in order to effectuate the federal and state policies, where the insurer's cause of action, unaided by the counterclaim, involves less than $10,000. Under the Texas law creating the substantive rights, the insureree's cause of action is only the right to set aside the Board's award and *does not put in issue* any greater claims for compensation for which the employee might choose to counterclaim.*

Where the insurer's claim is beneath the federal jurisdictional amount, Petitioner believes the abstention doctrine should prevent the plaintiff from satisfying the amount by resort to the employee's potential or actual counterclaim. Since under *28 U. S. C. § 1445(c)* the insurer can not re-

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*In Morris v. Maryland Casualty Co., 130 S. W. 2d 1080 (Tex. Civ. App. 1939), the employee filed a general claim before the Board which would entitle him to subsequently claim total and permanent disability. The Board awarded $450 which satisfied the employee. The insurer brought suit to set aside the award in the Texas County Court which has a maximum jurisdiction of $1,000. The employee moved to dismiss alleging that the amount in controversy was over $1,000. Since the employee did not counterclaim for over $1,000, jurisdiction was upheld and the Board's award was automatically vacated. The *Morris* case is a correct application of Texas Law. See Booth v. Texas Employers' Ins. Ass'n., 132 Tex. 237, 123 S. W. 2d 322 (1938).

The statement in Horton v. Liberty Mutual, 367 U. S. 348, 354, "[N]o matter which party brings it into court, the controversy remains the same", is not generally correct. When the insurer brings the suit the extent of the controversy will depend upon what the defendant chooses to do by way of counterclaim.

move the employee's claim, the insurer should not be allowed to "bring" the employee's claim in federal court through the potential counterclaim device.

There appears to be no specific policy in favor of federal courts exercising jurisdiction over such cases as the one at bar. Moreover, the dismissal of the federal suit in favor of the state court action would not result in difficulties well stated in the dissent to *Louisiana Power & Light Co. v. City of Thibodeaux, 360 U. S. 25, 31-44.* To the contrary it would give the injured workman the right to an expeditious prosecution of his claim for compensation in his state court in accordance with the expressed intent of Congress.

Petitioner submits that the abstention question is of such significance that it warrants consideration by this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Art. 8307, Sec. 5 34a

Sec. 8307a 37a

APPENDIX A

Judgment of the United States District Court for the Northern District of Texas, entered June 16, 1961 (Tr. pp. 181-182.)

[Heading Omitted]

JUDGMENT

The above entitled and numbered cause came on regularly to be heard on the 12th day of June, 1961, and came Horace M. Hart, by his attorneys, and announced in open court that the said Horace M. Hart waived his plea to the jurisdiction of the Court previously filed in the cause. And came United States Fidelity and Guaranty Company, by its attorney; and the parties, through their respective attorneys, announced ready for trial. And through their said attorneys, it was stipulated by the parties that for convenience the nominal Defendant, Horace M. Hart, would be known in the trial as the Plaintiff, and the nominal Plaintiff, United States Fidelity and Guaranty Company, a corporation, would be known in the trial as the Defendant. And came a Jury of twelve (12) good and lawful jurors, who being duly empaneled and sworn, after having considered the pleadings as presented by respective counsel, evidence and argument of counsel, did in open court return their verdict in response to the Court's charge as follows:

> "We, the Jury, find for the Plaintiff total disability for eleven (11) weeks Partial Disability to the extent of 33⅓% for 68 weeks.
>
> William J. Moore, Foreman."

Said findings of the Jury were received by the Court and accepted by the Court as the verdict of the Jury and were filed and entered of record on the Minutes of the Court.

It appearing to the Court from the undisputed evidence that the Defendant, United States Fidelity and Guaranty Company, has previously paid the Plaintiff, Horace M. Hart, eleven (11) weeks total disability at $35.00 per week, which is the maximum compensation rate, it is the opinion of the Court that Plaintiff is not entitled to recover anything further for total disability.

It having been agreed in open court that the average weekly wages of the Plaintiff, Horace M. Hart, before his injury was $90.00 per week, and it having been agreed in open court that any sum that might be awarded to the Plaintiff, Horace M. Hart, would be awarded to him in a lump sum, the Court is of the opinion that the Plaintiff, Horace M. Hart, is entitled to recover of and from the Defendant, United States Fidelity and Guaranty Company, sixty per cent (60%) of one-third (⅓) of $90.00 per week for a period of sixty-eight (68) weeks, or a total of $1224.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Horace M. Hart, do have and recover of and from the Defendant, United States Fidelity and Guaranty Company, the sum of $1224.00, together with all costs of suit, for which execution may issue. Out of said sum of $1224.00, $367.20 is to be received by Marvin Jones and Jack Gay of Dallas, Texas, for their services in representing said Plaintiff, Horace M. Hart.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the award of the Industrial Accident Board of the State of Texas entered on the 21st day of June, 1960, in cause No. U-11014 styled "Horace M. Hart, Employee, Wesco Materials Corporation, Employer, United States Fidelity and Guaranty Company, Insurer", be and the same is hereby set aside and held for naught.

To the foregoing judgment, the Plaintiff, Horace M. Hart, excepted and is allowed an exception.

SIGNED AND ENTERED this 15 day of June, 1961.

/s/ T. Whitfield Davidson
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:
/s/ M. C. Jones
OF ATTORNEYS FOR
PLAINTIFF

/s/ Curtis White
ATTORNEY FOR
DEFENDANT

APPENDIX B

Respondent's Complaint (Tr. pp. 2-4).

[Heading Omitted]

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES the United States Fidelity and Guaranty Company, a corporation, hereinafter called Plaintiff, complaining of Horace M. Hart, hereinafter called Defendant, and would show the Court as follows:

I.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland and at all relevant times has been and still is a citizen and resident of the State of Maryland and writes Workmen's Compensation Insurance in Texas under a duly authorized permit.

II.

Defendant at all relevant times has been and still is a citizen and resident of Dallas, Dallas County, Texas. He lives at 1226 Diceman Avenue, Dallas, Texas.

III.

Plaintiff shows that heretofore, to-wit, on or about the 11th day of Jaunary, 1960, Defendant files his notice of injury and claim for compensation under the Workmen's Compensation Law of the State of Texas with the Industrial Accident Board at Austin, Texas, in which he claimed, in substance, that on or about November 28, 1959 he was in-

jured in Dallas County, Texas while working for Wesco Materials Corporation. In his notice of injury and claim for compensation, the Defendant alleged:

> "I was operating maintainer blading roads and a piece of cable wrapped around the blade of the maintainer. I dismounted from the cab and caught hold of the piece of cable to jerk it off the blade and felt a severe pain in my back between the 4th & 5th vertibrae."

The Defendant claimed before the Board that he was working for Wesco Materials Corporation at the time of his injury and that he made an average weekly wage of $90.00. The amount of the said claim under the facts set out by the Defendant before the Board can be definitely determined and the amount in controversy exceeds $10,000.00 exclusive of interest and costs.

Plaintiff shows that heretofore, to-wit, on or about the 21st day of June, 1960 the Industrial Accident Board of the State of Texas made its final ruling and award in cause No. U 11014 styled "Horace M. Hart, employee v. Wesco Materials Corporation, employer, and United States Fidelity and Guaranty Company, insurer", under the terms of which Plaintiff has been ordered to pay the Defendant herein the sum of $35.00 per week for 26 consecutive weeks, a total of $910.00, such award being based upon the claim above described.

IV.

Plaintiff shows that within less than twenty days after said award of June 21, 1960, Plaintiff gave due notice to the Industrial Accident Board of the State of Texas that the

Plaintiff was not willing to and did not consent to abide by said final ruling and award of June 21, 1960; and within said twenty day period the Plaintiff further notified the said Industrial Accident Board of the State of Texas that within twenty days after the filing of such notice of its unwillingness to abide by said award of June 21, 1960 Plaintiff would file suit in a court of competent jurisdiction for the purpose of setting aside said award.

V.

Plaintiff further alleges that the amount involved in Defendant's claim before the Industrial Accident Board exceeds $10,000.00 exclusive of interest and costs.

VI.

Plaintiff files this suit in a court of competent jurisdiction in the division of the Federal Judicial District of North Texas, which includes Dallas County, Texas in which the injury was claimed to have been sustained by the said Horace M. Hart within less than twenty days from the filing of notice of appeal with the Industrial Accident Board of Texas.

VII.

Plaintiff says that the Defendant is not disabled as he claims, that the Defendant has not sustained total disability but partial only, that such injuries as the Defendant may have sustained were temporary and not permanent, that such injuries as the Defendant may have sustained have long since healed and that the Defendant is not now incapacitated in any way on account of said injuries.

VIII.

Plaintiff shows that it paid the Defendant following the date of his claimed injury eleven weeks at $35.00 per week, or a total of $405.00 and that it has fully paid everything that it owes the Defendant under the compensation policy which it carried for Wesco Materials Corporation. If it be mistaken, it says that it is entitled to credit for said sum if anything additional is owing to the Defendant.

WHEREFORE, Plaintiff prays that summons for the Defendant duly issue and that upon final hearing hereof said award of the Industrial Accident Board of the State of Texas dated the 21st day of June, 1960 be set aside and that the Plaintiff go hence without day and recover its costs. In the alternative, that if any further compensation is awarded to the Defendant, Plaintiff have credit for the $405.00 previously paid. Plaintiff prays for all relief, general and special, to which it may be entitled.

/s/ Curtis White

1110 Southland Center,
Dallas 1, Texas
ATTORNEY FOR THE
PLAINTIFF.

APPENDIX C

Petitioner's Answer and Counter Claim
(Tr. pp. 6-10).

[Heading Omitted]

To the Honorable Judge of Said Court:

Now comes Horace M. Hart and files this his original answer and cross-action, complaining of United States Fidelity and Guaranty Company, and for cause of action represents to the court:

1.

Defendant admits the allegations contained in paragraphs I and II, of plaintiff's original petition.

2.

Defendant admits the allegations contained in paragraph III, except the portion as follows: "The amount of the said claim under the facts set out by defendant before the board can be definitely determined and the amount in controversy exceeds $10,000.00 exclusive of interest and costs." which portion is denied.

3.

Defendant has no knowledge upon which to admit or deny the allegations contained in paragraph IV, except that defendant denies that plaintiff's suit is filed in a court of competent jurisdiction.

4.

Defendant denies the allegations contained in paragraphs V. VI, VII, and VIII.

5.

And now, pleading further herein, and by way of cross-action against the plaintiff, hereinafter referred to as cross-defendant, this defendant hereinafter referred to as cross-plaintiff, represents to the court that on the 28th day of November, 1959, while employed by Wesco Materials Corporation, and in the course and scope of his employment, cross-plaintiff was pulling a cable when he sustained an injury to his back; that he strained and injured the muscles, ligaments, and other soft parts of his back, and particularly his lumbar and sacral spine and the intervertebral discs, soft tissues, bones, veins, arteries, muscles and nerves of the low back especially the lumbar and sacral areas were torn, strained, injured and damaged, all of which necessitated medical care, for which he was hospitalized from December 2, 1959, and from December 28, 1959, to January 2, 1960, under the care of Dr. James C. Williamson of Seagoville, Texas; that upon his release from the hospital on January 2, 1960, he was fitted with a back brace, which he is wearing constantly to relieve the pain in his back; that since the date of his injury as aforesaid, cross-plaintiff has suffered constant pain in his back, that prior to said injuries cross-plaintiff was a strong, healthy, able bodied, industrious person, able to perform and did perform the duties of his employment in a satisfactory manner; that

said injuries and their effect upon the cross-plaintiff have rendered him totally disabled for a period of 26 weeks and thereafter reduced his earning capacity by 33⅓%, by virtue of which he is entitled to compensation of and from the cross-defendent at the rate of $35.00 per week for a total period of 26 weeks, and $18.00 per week for a total period of 300 weeks, making a total sum of $6310.00, plus interest thereon at the rate of 4% per annum on all accrued installments of compensation from the date such installments became due and were not paid.

6.

That prior to said date, cross-defendant had issued to said employer, who had in its employ more than three employees at said time, a policy of Workmen's Compensation insurance under the laws of the State of Texas, whereby said employer became a subscriber as that term is defined in the Employer's Liability Act, or Workmen's Compensation Law, of the State of Texas, which said policy of insurance covered the work being done by said employer at the time herein mentioned, and which policy was in full force and effect at all times herein mentioned; and defendant is hereby given notice to produce, on trial of this cause, said policy of insurance, and if same is not produced, secondary evidence will be offered to prove the existence of same.

7.

That said injury was an accidental injury and was sustained in the County of Dallas, Texas, and that on said date cross-plaintiff had been for approximately 4 years em-

ployed by said employer in the capacity of equipment operator, doing such work as was directed and incident to such employment; that said contract of employment was oral.

8.

That within thirty days after the date of said injuries the cross-plaintiff gave notice of said injuries to said employer, to cross-defendant and to the Industrial Accident Board of the State of Texas; that said employer had actual knowledge of said injuries at the time of their occurrence; that within six months from the date of injury, cross-plaintiff filed a formal notice of claim for compensation with said Board in the manner prescribed by law; that on the 21st day of June, 1960, said Board made its final ruling, decision and award on said claim; that thereafter, within twenty days from date of said order, cross-plaintiff gave notice in writing to said Board in the manner prescribed by law that he was not willing and would not consent to abide by the ruling of said Board on said claim; that cross-plaintiff, within twenty days after giving said notice, filed this suit in this court, which has jurisdiction of cross-plaintiff's claim.

9.

Cross-plaintiff worked in such employment substantially the whole of the year immediately preceding said injuries at a weekly salary of $90.00; that there were other employees of the same class who worked in the same or neighboring place substantially the whole of the year immediately pre-

ceding the said accident at a weekly salary of $90.00; and cross-plaintiff alleges that $90.000 is the average weekly wage of cross-plaintiff which would be fair and just to both parties.

10.

That by reason of the cross-defendant's failure and refusal to pay cross-plaintiff compensation, it was necessary for cross-plaintiff to have an attorney represent him; that cross-plaintiff employed the law firm of Jones, Phillips & Watkins of Dallas County, Texas, a firm of practicing attorneys, to represent him in his claim for compensation before the Industrial Accident Board of the State of Texas, and to prosecute this suit, and he has contracted with said attorneys to pay them as attorneys' fee an amount equal to 30% of the amount recovered in this case, which should be paid to said attorneys in lump sum out of the compensation herein awarded.

11.

Cross-Plaintiff would show that he is married and has family responsibilities; that he has no property with which he can support himself and family; that if compensation is paid to him in weekly payment, after the attorney's fee is paid out of each payment the balance will be wholly inadequate to support him and his family; that cross-plaintiff is a man of prudence and care in business matters and in the handling of money, and that if compensation herein due him be paid in a lump sum or if weekly payments be accelerated

as provided by law, he will be able to invest part of same, out of which he can make a living for himself and his family; that if the future payments of compensation be not awarded to him in a lump sum or be accelerated, then manifest hardship and injustice will result to cross-plaintiff.

WHEREFORE, premises considered, defendant and cross-plaintiff prays that plaintiff and cross-defendant be cited to appear and answer herein, and that upon trial hereof judgment be rendered setting aside the final decision and award of the Industrial Accident Board, and for such compensation as cross-plaintiff may be entitled to receive under the Workmen's Compensation Act of the State of Texas, together with interest thereon from the respective dates of maturity of each installment of compensation which has matured prior to the entry of this judgment, for lump sum award for the balance of the compensation, allowing 4% discount on such future installments, or, in the alternative, that the payments be accelerated as provided by law, for approval of cross-plaintiff's contract with his attorneys, that 30% of the recovery be awarded to said attorneys, for all costs of suit, and for such other and further relief, special and general, in law and in equity, to which cross-plaintiff may be justly entitled.

JONES, PHILLIPS & WATKINS

By /s/ Jack Gay

JACK GAY, of Counsel
Attorneys for Defendant and
Cross-plaintiff
1714 Life Building
Dallas, Texas RI 7-8348

APPENDIX D

Respondent's Reply (Tr. pp. 11-12)

[Heading Omitted]

To the Honorable Judges of Said Court:

NOW COMES the United States Fidelity and Guaranty Company, a corporation, and files this its answer to the cross-action of the cross-complaint, Horace M. Hart, and would show the Court as follows:

I.

Cross-defendant denies that the cross-plaintiff is disabled as he claims. Cross-defendant says that such injuries as the plaintiff may have sustained were temporary and not permanent, partial and not total. Cross-defendant says that cross-plaintiff was disabled only for about eleven weeks, during which the cross-defendant paid him $405.00 at $35.00 per week. Cross-defendant says that such injuries as the cross-plaintiff may have sustained have long since healed and that cross-plaintiff is not now incapacitated in any way on account of his injuries. Cross-defendant says that after eleven weeks following his injury the cross-plaintiff returned to work at the same weekly wage that he was earning prior to the date of his claimed injury and has been working steadily ever since.

II.

Cross-defendant shows that after the eleven weeks for which the cross-plaintiff was paid compensation cross-plain-

tiff's average weekly earning capacity has been as much as it was prior to the date on which he claims to have been injured.

WHEREFORE, cross-defendant prays that cross-plaintiff take nothing by his cross-action and that this cross-defendant be discharged with its costs; in the alternative, if any additional compensation is awarded, that cross-defendant have credit for the $405.00 previously paid.

CURTIS WHITE,

1110 Southland Center,
Dallas, Texas

Attorney for Cross-Defendant,
United States Fidelity and
Guaranty Company

A copy of the foregoing answer was mailed this 29th day of May, 1961, to Jack Gay, 1714 Life Building, Dallas, Texas, attorney for Horace M. Hart.

APPENDIX E

Respondent's Plea in Abatement to Petitioner's State Court Action to Set Aside Award and to Recover $6310.00 Compensation

No. 53282-G

HORACE HART

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY

IN THE 134TH DISTRICT COURT OF DALLAS COUNTY, TEXAS

To the Honorable Judge of Said Court:

Now comes United States Fidelity and Guaranty Company, Defendant herein, and files this its Plea of Abatement, and subject thereto its Answer, and would show the Court as follows:

I.

Defendant shows that on June 23, 1960, it perfected its appeal from the award of the Industrial Accident Board of the State of Texas by filing Civil Action No. 8525 in the United States District Court for the Northern District of Texas, styled United States Fidelity and Guaranty Company vs. Horace M. Hart. A true and correct copy of its petition filed in said United States District Court, marked "Exhibit

A", is attached hereto and made a part hereof the same as though set out herein in full.

Defendant shows that this suit involving the same subject matter as in the United States District Court suit above mentioned is an attempted appeal by Horace M. Hart, the same Horace M. Hart named Defendant in the United States District Court proceeding above referred to, filed in this Honorable Court on the 19th day of July, 1960, some 26 days after the United States District Court in and for the Northern District of Texas, Dallas Division, had already acquired jurisdiction of the subject matter herein involved.

Defendant shows that the filing of the appeal by the Defendant herein in the Federal Court above referred to ousted the jurisdiction of the Industrial Accident Board of the State of Texas, and this Honorable Court acquired no jurisdiction to decide the matters herein involved, jurisdiction of which had previously been acquired by said Federal Court.

WHEREFORE, Defendant prays that the above suit be abated and costs taxed against the Plaintiff, Horace M. Hart.

CURTIS WHITE,

1110 Southland Center
Dallas, Texas

Attorney for the Defendant

APPENDIX F

Extracts From: 104 Cong. Rec. 12683, 12687 (1958).

Congressman Smith of Virginia, at page 12683:

"We have heard a lot of discussion in recent times—and it is a very serious question—about the way Federal courts are being overwhelmed with work so that many of them are years behind in their dockets. The best way to take care of that situation is to relieve, as far as we properly can, the Federal Court from some of the petty cases that should be tried in the State courts where they belong.

"I had hoped that the bill would go much further than that, but the Committee did not go along with me. * * * "* * *.

" * * * However, the committee on the judiciary, I believe, has argued to an amendment which will relieve the courts in many states of a great deal of work. That amendment is simply this. There are 4, or 5, or 6 States in the Union where these compensation cases are being removed in great number to the Federal courts. Some courts are very much overburdened with that type of case.

"As a matter of fact, I had a letter the other day from my former colleague, Judge Thomasson, who saw that I had introduced a similar bill. He said it had hampered his work, the time taken up with these cases, in view of the particular State law in the State of Texas.

" * * * While I am on my feet I want to go back to the question of diversity of citizenship with which these Federal courts are very much overburdened in many places. I am told that in some of the large cities the dockets of the Federal courts are something like 4 years behind. That is due largely to the fact that corporations which are incorporated in some other State may do

business in New York or Chicago, or cities like that, and may remove all their cases to the Federal court. Particularly in the country areas, that is not only a burden upon the courts but it is a serious burden and injustice to plaintiffs who sue and are then removed to the Federal court and may have to travel one hundred or two hundred miles, take all their witnesses with them, to try a case of not great consequence that ought to be tried locally in the county where it arose."

Congressman Keating of New York, at page 12687:

"Federal Courts should be resorted to only to resolve controversies involving substantial sums of money, unless the case is brought under a Federal statute which provides the exclusive remedy. By this I do not mean to say that we should close the Federal courts to all but the well-to-do or to big business, but we certainly should not expose the court to a barrage of relatively minor matters which could easily be disposed of in the local courts. This is in line with the policy established in diversity cases as long as 1789."

APPENDIX G

Calendar No. 1865

85th Congress
2d Session

SENATE

Report No. 1830

JURISDICTION OF FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES: PROHIBITING THE REMOVAL TO DISTRICT COURTS OF THE UNITED STATES OF ACTIONS COMMENCED IN STATE COURTS UNDER STATE WORKMEN'S COMPENSATION LAWS

July 11 (legislative day, July 10), 1958—Ordered to be printed

Mr. Eastland, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 11102]

The Committee on the Judiciary, to which was referred the bill (H. R. 11102) amending the jurisdiction of district courts in civil actions with regard to the amount in controversy and diversity of citizenship, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

Purpose

The purpose of the proposed legislation is to increase the amount in controversy in cases of a Federal question and of diversity of citizenship from the existing $3,000 to $10,000. It further provides, for purposes of diversity of citizenship jurisdiction, that a corporation is to be deemed a citizen of the State by which it has been incorporated and of the State where it has its principal place of business. The bill further provides that a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

• • • • •

Jurisdictional Amount

The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies. The present requirement of $3,000 has been on the statute books since 1911 and obviously the

value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum was established. It is apparent that since $3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal jurisdiction, there is today no substantiality in such an amount for jurisdictional problems. Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000.

* * * * *

Prohibiting Removal of Workmen's Compensation Cases to Federal Courts

It is well settled that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by article III of the Constitution. In the early case of *Cary* v. *Curtis* (44 U.S. [3 How.] 235), the Supreme Court stated the rule as follows:

> "* * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing

> them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion merely * * *" (p. 244).

See also *Chicot County Drainage* v. *Bank* (308 U.S. 371, 376); *Lauf* v. *Shinner* (303 U.S. 323, 330); *Hallowell* v. *Commons* (239 U.S. 506, 509). Since removal jurisdiction in the Federal district courts exists by virtue of statute, it is within the authority of Congress to prohibit removal to these courts. See discussion in a recent case (1956), *In re Green River Drainage Area* (147 F. Supp. 127, 140). See also *Kansas City Southern* v. *Cook* ((1921), 140 S.W. 579, 100 Ark. 467).

The jurisdiction of Federal courts based on diversity of citizenship goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789. This grant of jurisdiction by the Congress to the Federal courts in diversity of citizenship cases was to guard against possible discrimination by State courts in favor of resident over nonresident litigants. This authority to resort to the Federal rather than to the State courts in diversity cases has led to abuse. The great increase in diversity cases in recent years has placed great burdens on the Federal judiciary; as was well stated by Mr. Justice Frankfurter in *Lumbermen's*

Mutual Casualty Company v. *Florence R. Elbert* (348 U.S. 48, 60, 61).

> "Since diversity jurisdiction is increasingly the biggest source of the civil business of the district courts, the continuance of that jurisdiction will necessarily involve inflation of the number of the district judges. This in turn will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the Federal courts. Madison believed that Congress would return to the State courts judicial power entrusted to the Federal courts 'when they find the tribunals of the States established on a good footing.' 3 Elliot's Debates 536 (1891). Can it fairly be said that State tribunals are not now established on a sufficiently 'good footing' to adjudicate State litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the State tribunals not yet be trusted to mete out justice to nonresident litigants; should resident litigants not be compelled to entrust their own State tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming State tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid State courts?"

In a number of States the workload of the Federal courts has greatly increased because of the removal of workmen's compensation cases from the State courts to the Federal courts. Statistics prepared by the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, graphically display the effect of the workmen's compensation suits removed from State to Federal courts in

Texas and New Mexico. These studies for the fiscal year 1957 are as follows:

Workmen's compensation suits commenced in the United States district courts in Texas during the fiscal year 1957, showing the number of original suits and the number of suits removed from State courts.

	Total Cases	Original Actions	Removed From State Court	Remanded, Reopened or Received by Transfer
Northern district:				
Insurance company:				
Plaintiff	10	10	—	—
Defendant	795	435	350	10
Eastern district:				
Insurance company:				
Plaintiff	8	7	1	—
Defendant	392	177	213	2
Southern district:				
Insurance company:				
Plaintiff	5	3	1	1
Defendant	678	204	472	2
Western district:				
Insurance company:				
Plaintiff	5	5	—	—
Defendant	254	141	111	2
Total for State:				
Insurance company:				
Plaintiff	28	25	2	1
Defendant	2,119	957	1,146	16
Total	2,147	982	1,148	17

Workmen's compensation suits commenced in the United States district court in New Mexico during the fiscal year 1957, showing the number of original suits and the number of suits removed from State courts

	Total Cases	Original Actions	Removed From State Court	Remanded, Reopened or Received by Transfer
1st quarter	12	3	9	—
2d quarter	20	2	18	—
3d quarter	23	2	20	1
4th quarter	13	4	—	1
Total	68	11	55	2

Workmen's compensation cases arise and exist only by virtue of State laws. No Federal question is involved and no law of the United States is involved in these cases.

The removal of workmen's compensation cases from State courts to the Federal courts adds to the already over-burdened docket of the Federal courts, the congestion in some of which is now most deplorable.

Nearly all of the State statutes on workmen's compensation provide summary proceedings for the expeditious and inexpensive settlement of claims by injured workmen against the employer. The procedure provided in such State statutes is not, as a rule, applicable to procedure in Federal courts. When cases are removed to the Federal court the State statutes, in many instances, are entirely nullified. For instance, some of these State statutes limit the venue to the place where

the accident occurred or to the district of the workman's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court.

Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act—that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court.

Section 5 of the bill was added as an amendment on the floor of the House. The Committee on the Judiciary, at its meeting on June 30, had reported a bill, S. 1615, to the Senate. The language of the Senate bill is identical to the language inserted as an amendment on the floor of the House, that is, as now contained in section 5 of this bill.

The Judicial Conference of the United States has recognized the need for this legislation by approving S. 1615 as an appropriate limitation of the diversity jurisdiction.

The Department of Justice, in reporting to this committee on the merits of S. 1615, recommends favorable consideration of this legislation as an aid in meeting the problem of court congestion.

• • • • •

Session of March 1957

Chief Judge Biggs reported that the Committee had considered at length various proposals for restricting or modifying the present diversity jurisdiction of the United States courts. The Committee found that the situation in respect to diversity jurisdiction is an extremely complex one and was not prepared to deal at length with the subject until further statistics have been procured from the Administrative Office and the matter has been considered further.

Previously the Committee had recommended that the jurisdictional amount be placed at $15,000, exclusive of interest and costs, but it was now of the view that it should modify its former recommendation and adhere to that expressed by the Committee on Jurisdiction and Venue of which Chief Judge Parker was Chairman. Accordingly, it unanimously resolved that the Committee recommend to the Judicial Conference that the jurisdictional amount in diversity cases be increased to $10,000, exclusive of interest and costs, and that every effort be made to procure the enactment of such legislation by the present Congress.

The Committee also was of the view that the recommendation made to the Conference by the Committee on Jurisdiction and Venue, that a corporation be deemed to be a citizen not only of the State of its incorporation but also of the State in which it has its principal place of business, should be renewed at the present Congress.

These recommendations were adopted by the Conference and the Committee was authorized to continue its study of jurisdiction in diversity of citizenship cases.

Department of Justice,
Office of the Deputy Attorney General,
Washington, D.C., April 28, 1958.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

Dear Senator: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1615) to prohibit the removal to district courts of the United States of actions commenced in State courts under State workmen's compensation laws.

The bill would amend section 1445 of title 28, United States Code, by adding a new category of actions which may not be removed under the section from State to Federal district courts. The bill would provide that a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

It is well established that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by article III of the Constitution. In the early case of *Cary* v. *Curtis* (44 U.S. 235), the Supreme Court stated the rule as follows:

"* * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion merely * * *" (p. 244). See also *Chicot County Drainage* v. *Bank,* (308 U.S. 371, 376); *Lauf* v. *Shinner* (303 U.S. 323, 330); *Hallowell* v. *Commons* (239 U.S. 506, 509). Since removal jurisdiction in the Federal district courts exists by virtue of statute, it is within the authority of Congress to prohibit removal to these courts. See discussion in a recent case (1956), *In re Green River Drainage Area* (147 F. Supp. 127, 140). See also *Kansas City Southern* v. *Cook* (1911), 140 S.W. 579, 100 Ark. 467).

As an aid in meeting the problem of court congestion, the Department of Justice favors the legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

Lawrence E. Walsh,
Deputy Attorney General.

Administrative Office of the United States Courts,
Washington, D. C., March 7, 1958.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

Dear Mr. Chairman: The Judicial Conference of the United States, at its session in September 1957, considered the proposal contained in S. 1615, now pending before your committee, to prohibit the removal to district courts of the United States of actions commenced in State courts under State workmen's compensation laws. At that time, the committees of the Conference on Court Administration and Supporting Personnel, in a joint report, stated that the United States district courts in Texas, Alabama, and New Mexico receive a substantial number of such cases by removal and that the district courts of Louisiana receive some such cases.

I am authorized to inform you that the Judicial Conference of the United States, upon the recommendation of the committees, approved S. 1615 as an appropriate limitation of the diversity jurisdiction.

Sincerely yours,

Warren Olney III, *Director.*

* * * * *

APPENDIX H

Workmen's Compensation Law, Texas Civil Statutes (Vernon 1948, Supp. 1960) Art. 8306; Art. 8307, Sec. 5; Art. 8307a.

Art. 8306 (in relevant part)

Total Incapacity

Sec. 10. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to sixty per cent (60%) of his average weekly wages, but not more than Thirty-five Dollars ($35) nor less than Nine Dollars ($9) and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury.

Partial Incapacity

Sec. 11. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to sixty per cent (60%) of the difference between his average weekly wages before the injury and his average weekly wage earning capacity during the existence of such partial incapacity, but in no case more than Thirty-five Dollars ($35) per week. The period covered by such compensation shall be in no case greater than three hundred (300) weeks; provided that in no case shall the period of compensation for total and partial incapacity exceed four hundred and one (401) weeks from the date of injury. Compensation for all partial incapacity resulting from a general injury shall be computed

in the manner provided in this Section, and shall not be computed on a basis of a percentage of disability.

Injuries Constituting Total and Permanent Incapacity

Sec. 11a. In cases of the following injuries, the incapacity shall conclusively be held to be total and permanent, to wit:

(1) The total and permanent loss of the sight of both eyes.

(2) The loss of both feet at or above the ankle.

(3) The loss of both hands at or above the wrist.

(4) A similar loss of one hand and one foot.

(5) An injury to the spine resulting in permanent and complete paralysis of both arms or both legs or of one arm and one leg.

(6) An injury to the skull resulting in incurable insanity or imbecility.

In any of the above enumerated cases it shall be considered that the total loss of the use of a member shall be equivalent to and draw the same compensation during the time of which total loss of the use thereof as for the total and permanent loss of such member.

The above enumeration is not to be taken as exclusive but in all other cases the burden of proof shall be on the claimant to prove that his injuries have resulted in permanent, total incapacity.

Lump-Sum Settlement

Sec. 15. In cases where death or incapacity in any degree results from an injury, the liability of the association may

be redeemed by the payment of a lump-sum by agreement of the parties thereto subject to the approval of the Industrial Accident Board. Where in the judgment of the Board manifest hardship and injury would otherwise result, the Board may compel the association to redeem the liability by payment of the award of the Board in a lump-sum, and a discount shall be allowed for present payment in accordance with Article 8306a, of the Revised Civil Statutes of 1925, as amended. (As amended by Chapter 357, Laws of 1959, affective June 1, 1959.)

Art. 8307 (in relevant part)

Determination of Questions; Suit to Set Aside Final Ruling and Decision; Revocation of Association's License

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of the law, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision by said board, file with said board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred to set aside said final ruling and decision, and said board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the

disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. When ever such suit is brought, the rights and liability of the parties thereto shall be determined by the provision of this law, and the suit of the injured employee or person suing on account of the death of such employee shall be against the association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court upon request free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to shall be admissible in evidence in any court in this State upon trial of such claim therein pending and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the board, after having given notice as above provided, fails within said twenty (20) days to institute and

prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the association, it shall at once comply with such final ruling and decision; and failing to do so the board shall certify the fact to the Commissioner of Insurance and such certificate shall be sufficient cause to justify said Commissioner to revoke or forfeit the license or permit of such association to business in Texas.

Notwithstanding any other provision of this law, as amended, no award of the Board, and no judgment of the court, having jurisdiction of a claim against the association for the cost or expense of items of medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliance furnished to an employee under circumstances creating a liability therefor on the part of the association under the provisions of this law, shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment. The first such final award or judgment rendered on such claim shall be res judicata of the liability of the association for all such cost or expense which could have been claimed up to the date of said award or judgment and of the issue that the injury of said employee is subject to the provisions of this law with respect to such items, but shall not be res judicata of the obligation of the association to furnish or pay for any such items after the date of said award or judgment. After the first such final award or judgment, the Board shall have continuing jurisdiction in the same case to render successive awards to determine the liability of the association for the cost or expense of any

such items actually furnished to and received by said employee not more than six (6) months prior to the date of each such successive award, until the association shall have fully discharged its obligation under this law to furnish all such medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances to which said employee may be entitled; provided, each such successive award of the Board shall be subject to a suit to set aside said award by a court of competent jurisdiction, in the same manner as provided in the case of other awards under this law.

Art. 8307a (in relevant part)

Suit to Set Aside Decision by Industrial Accident Board; Transfer to County Where Injury Occurred

Any interested party who is not willing and does not consent to abide by the final ruling and decision of the Industrial Accident Board shall, in the manner and within the time provided by Section 5 of Article 8307, Revised Civil Statutes of 1925, file notice with said Board, and bring suit in the county where the injury occurred to set aside said final ruling and decision; however, in the event such suit is brought in any county other than the county where the injury occurred, the court in which same is filed shall, upon ascertaining that it does not have jurisdiction to render judgment upon the merits, transfer the case to the proper court in the county where the injury occurred. Provided, however, that notice of said transfer shall be given to the parties and said suit when filed in the court to which the transfer is made, shall be considered for all purposes, the same as if originally filed in said court.

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In the

Supreme Court of the United States

No. 372

HORACE HART,
Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REO KNOWLES,
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In the

Supreme Court of the United States

No. 372

HORACE HART,

Petitioner,

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE NATURE OF THE CASE AND RESULT BELOW

This is a workmen's compensation case in which Petitioner alleged in his claim filed before the Texas Industrial Accident Board that he sustained a general accident injury while employed by Wesco Materials Corporation in Dallas County, Texas, November 28, 1959. His claim would have supported a recovery before the Board of $14,035.00.

The Board entered an award of $910.00 and Respondent duly filed suit in the United States District Court, Northern District of Texas, Dallas Division, seeking to be relieved of a claim, the maximum value of which was $14,035.00.

Jurisdiction of the Federal Court was based upon the diversity statute (28 U. S. C. A., Sec. 1332).

After suit was brought, Petitioner moved to dismiss for want of jurisdiction and filed a counter claim for $6310.00.

Although Petitioner claimed in his pleadings in the United States District Court that less than $10,000.00 was involved and, therefore, the Court was without jurisdiction, he waived all claims to the jurisdiction and demanded a trial. As a result of the trial to a jury, he was awarded $1224.00. Petitioner seeks a review of the judgment he obtained with which he now claims to be dissatisfied.

RESPONDENT'S COUNTERPOINTS

FIRST COUNTERPOINT

The appeal in this case has not been properly perfected to the Court of Appeals and this Honorable Court lacks jurisdiction to grant a Writ of Certiorari.

SECOND COUNTERPOINT

This is not a proper case for the granting of a Writ of Certiorari prior to a judgment by the Court of Appeals.

THIRD COUNTERPOINT

Federal jurisdiction exists in this case because the amount in controversy is properly governed by the allegations of the Respondent's complaint rather than by Petitioner's counterclaim.

FIRST COUNTERPOINT—(Restated)

The appeal in this case has not been properly perfected to the Court of Appeals and this Honorable Court lacks jurisdiction to grant a Writ of Certiorari.

STATEMENT UNDER FIRST COUNTERPOINT

After a jury verdict, a judgment based thereon was entered by the trial court June 16, 1961 (Tr. pp. 181-182). Petitioner filed a motion for new trial June 23, 1961 (App. A infra). On July 14, 1961, Petitioner filed his application to *withdraw* his motion for new trial (App. B infra). While the motion for new trial was still pending, Petitioner filed his first notice of appeal July 14, 1961 (App. C infra). Order was entered by the trial court on the 19th day of July, 1961, *withdrawing* the motion for new trial (App. D infra). On July 24, 1961, Petitioner attempted to file a second notice of appeal (App. E infra).

ARGUMENT AND AUTHORITIES UNDER FIRST COUNTERPOINT

At page 2 of the Petition for Writ of Certiorari it is stated: "Appeal was duly perfected to the Court of Appeals". Respectfully, this is believed to be erroneous. By the terms of Rule 73(a) of the Federal Rules of Civil Procedure, Petitioner was required to file his notice of appeal within thirty days from the date of entry of the judgment. It is true that he attempted to file a notice of appeal on the 14th day of July, 1961, twenty-eight days after the entry of the judgment on June 16, 1961, but at that time his motion for new trial was

pending. It has been held in an unbroken line of cases by this Honorable Court and the Circuit Courts of Appeal that a notice of appeal filed while a motion for new trial is pending is premature and nugatory. See *Napier v. Delaware, Lackawanna and Western R. Co., 223 F. 2d 28; Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986; Zimmern v. United States, 298 U. S. 167, 56 S. Ct. 706, 80 L. Ed. 1118; Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 63 S. Ct. 543, 87 L. Ed. 714; Bowman v. Loperena, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177.*

The attempted notice of appeal filed July 14, 1961 by Petitioner was, therefore, a nullity.

Subsequently, the Court acted upon the application to withdraw the motion for new trial, and on July 19, 1961, entered an order decreeing its withdrawal.

Thus, on July 19, 1961, the case stood as though no notice of appeal had been given and no motion for new trial had been filed.

Rule 73(a) of the Federal Rules of Civil Procedure provides in part:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under Rule 50-(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact whether or not an authorization of the judgment would be required

> if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; *or denying a motion for a new trial under Rule 59*". (Emphasis added.)

Nothing in this rule authorizes extension of the time for appeal where the motion for new trial is *withdrawn* and the court enters an order not denying the motion but *withdrawing* it.

Generally, where a petition for rehearing, motion for new trial, or motion to vacate, amend or modify the judgment is seasonably made and *entertained*, the time for appeal does not begin to run until the disposition of the motion. See, *Leishman v. Associated Wholesale Electric Co., 318 U. S. 203; 87 L. Ed. 714* and cases cited under footnote 3, *87 L. Ed. 716.*

In *United States v. Ellicott, 223 U. S. 524; 56 L. Ed. 535 at p. 542* it is said:

> "The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgment or decrees of the court of claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purpose of appeal until a motion for a new trial or a petition for rehearing, as the case may be, *when entertained by the court*, has been disposed of; and the time for appeal begins to run from the date of such disposition. Kingman & Co. v. Western Mfg. Co., 170 U. S. 675, 680, 681, 42 L. Ed. 1192, 1194, 18 Sup. Ct. Rep. 786."

Denholm & McKay v. Commissioner of Internal Revenue, 132 F. 2d 243, by the First Circuit Court of Appeals was a case in which the United States Board of Tax Appeals had

ruled that taxpayer, Denholm & McKay Co., was entitled to a refund of taxes previously paid. After a period of thirty days within which, by the rules of the Board, a petition for rehearing might be filed but before the expiration of the statutory period of three months permitted for the filing of a petition for review in the Circuit Court of Appeals, the Commissioner of Internal Revenue filed before the Board a motion for reconsideration. Long after the expiration of the three-month period, the Board set aside its decision for the taxpayer and the taxpayer appealed. The Circuit Court recognized the rule that if a petition for rehearing is seasonably presented and "entertained", the time for taking an appeal may be extended. The Circuit Court held that since the Board had taken no action on the petition to reconsider its previous award until more than three months after the date of its original decision, the original decision had become final and the attempt of the Board to set it aside was beyond its jurisdiction. The Circuit Court had the following to say at page 247 of its opinion about the meaning of "entertainment":

> "What is meant by 'entertainment' of the petition for rehearing has not been entirely clear, as we had occassion to observe in Ortiz v. Public Service Commission, 1 Cir., 1940, 108 F. 2d 815, 817. Apparently it means merely that the court considers *on the merits* the grounds urged in the petition for rehearing. See Texas Pacific Ry. Co. v. Murphy, supra, 111 U. S. at page 489, 4 S. Ct. 497, 28 L. Ed. 492; United States v. Seminole Nation, supra; Bowman v. Lopereno, 1940, 311 U. S. 262, 266, 61 S. Ct. 20[illegible], 85 L. Ed. 177; Payne v. Garth, 8

> Cir., 1922, 285 F. 301, 309. When the published rules of the court permit the filing of a petition for rehearing within a stated period, that means that the court will ordinarily consider such petition on its merits, i.e., entertain it."

After which, in a footnote, the Court had this to say:

> "Perhaps, if such a petition, though filed within the time allowed, were ordered struck from the files, or denied, on the ground that it contained scandalous or contemptuous matter, without consideration of the merits, the petition would be deemed not to have been 'entertained' by the court; so that the time for taking an appeal would run from the date of the entry of the judgment."

Petitioner's motion for new trial was not "entertained" but was completely *withdrawn*. Therefore, the time for taking an appeal in the case at bar ran from the date of the entry of the judgment.

Petitioner's attempted second notice of appeal filed July 24, 1961 was filed more than thirty days after the final judgment was entered. Therefore, the appeal was not "duly perfected" as claimed by Petitioner on page 2 of his petition for Writ of Certiorari.

At page 2 of the application for Writ of Certiorari, Petitioner says his appeal was "docketed (in the Court of Appeals) therein on August 24, 1961 (Tr. pp. i, 193, 197.)" If it could be considered that by withdrawing the motion for new trial, the rule (as announced in the many cases above cited) that the filing of a notice of appeal during the pen-

dency of a motion for new trial is premature and nugatory may be ignored, and the notice of appeal filed July 14, 1961 was thereby revived, still the case on appeal to the Court of Appeals was not docketed within forty days from July 14, 1961, the date of the attempted first notice of appeal, as required by Rule 73(g) of the Federal Rules of Civil Procedure. It was not filed in that Court until the forty-first day following July 14, 1961. Failure to file the record within forty days after notice of appeal, without valid excuse, has been held to justify dismissal. See *U. S. v. Stanton, 172 F. 2d 642; U. S. v. Consolidated Freighiways, 178 F. 2d 756; U. S. v. Krause, et al., 197 F. 2d 329; U. S. v. Frijisaki, 198 F. 2d 747;* and *U. S. v. Lathrop, 199 F. 2d 954.*

For the want of notice of appeal within the thirty day period required by *Rule 73(a) of the Federal Rules of Civil Procedure*, the Court of Appeals for the Fifth Circuit does not have jurisdiction of this case; and in such a situation, the application for Writ of Certiorari to this Court should be denied. See, *Good Shot v. U. S., 1900, 21 S. Ct. 33, 179 U. S. 87, 45 L. Ed. 101.* See also, *King Iron Bridge & Manufacturing Co. v. Otoe County, Neb. 1887, 120 U. S. 225, 30 L. Ed. 623.* Jurisdiction of the lower appellate court is a necessity. It is lacking in the case at bar. Therefore, jurisdiction in this Honorable Court to entertain the petition for Writ of Certiorari is respectfully believed to be non-existent. See, *Mansfield, etc. R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462; Cameron v. Hodges, 127 U. S. 322, 32 L. Ed. 132; Parker v. Ormsby, 141 U. S. 81, 35 L. Ed. 654.*

SECOND COUNTERPOINT—(Restated)

This is not a proper case for the granting of a Writ of Certiorari prior to a judgment by the Court of Appeals.

ARGUMENT AND AUTHORITIES UNDER SECOND COUNTERPOINT

This Honorable Court should refuse to grant the Writ of Certiorari of Petitioner, Hart, before judgment by the Court of Appeals because:

(a) The question presented therein is not of sufficient public importance.

Supreme Court Rule 20 provides:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

In *Forsyth v. Hammon, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095*, the Court set forth the rules which would govern granting of a Writ of Certiorari prior to a final decision by the Circuit Court in the following words:

> "* * * it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question considered, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a state, or some matter affecting the interest of this nation in its internal or external relations demands such exercise."

The Court has consistently followed these rules and the cases in which certiorari has been granted prior to a decision by the Court of Appeals have been rare and have clearly presented matters of vital concern to the entire nation or a large proportion of its population. Comparison between such cases and the dispute in this case reveals that this case is not the kind to which this Court has formerly extended this unusual writ. The Petitioner generously estimates that the question will affect "literally hundreds of workmen's compensation cases" but the facts do not substantiate this.[1]

The following illustrate the type of questions to which this Court has previously limited this form of writ:

Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3, involved the power of the President of the U. S., in time of war, to proclaim that enemy agents be tried by military tribunals rather than the courts.

U. S. v. United Mine Workers of America, 330 U. S. 258, 91 L. Ed. 884, presented the question of whether or not the Norris-LaGuardia Act prohibited the Government from obtaining a temporary restraining order against John L. Lewis and the United Mine Workers to prevent a nation-wide strike.

H. P. Hood and Sons v. U. S., 307 U. S. 588, 83 L. Ed. 1478, considered the constitutionality of the Agricultural

[1]Petitioner's own statistics show that only twenty-five direct suits in the whole State of Texas in workmen's compensation cases were brought to the federal courts by insurance companies in the year 1957 (see App. G, page 25-a, of appendices attached to Petitioner's Petition for Writ of Certiorari); and since July 25 of 1958, when removals in workmen's compensation cases in Texas were prohibited, only 11 of such cases have been filed up to and including August 31, 1961, in the Dallas Division for the Northern District of Texas. Eleven workmen's compensation cases were taken to this same division of the court during the same period by employees (see certificate of Reo Knowles, App. G, infra).

Marketing Agreement Act of 1937 and the Writ of Certiorari was granted "because important questions of Federal Law undecided by this Court were involved and pending appeals in other cases with similar issues were ready for argument." (Opinion p. 1483.)

U. S. v. The Three Friends, 166 U. S. 1, 41 L. Ed. 897, presented an admiralty question decided on Writ of Certiorari; "not merely for the guidance of the Executive Department of the Government, but also to disclose to each citizen the limits which he might not go beyond in interfering in the affairs of another nation without violating the laws of this." Statement in *Forsyth v. Hammon,* supra, at page 515.

Mr. Justice Frankfurter, in commenting on the testimony of the Chief Justice of the Supreme Court against pending legislation designed to route certain cases directly from the District Court to the Supreme Court, listed one of the primary reasons mitigating against the reviewing of a case by the Supreme Court prior to decision by the Circuit Court as follows:

> "Probably, also, it (the Supreme Court) regarded the illumination which serious questions should derive from passing through a Circuit Court of Appeals as valuable to the perspective and thoroughness of the Court's own deliberative process." Frankfurter & Fisher, The Business of the Supreme Court at the October Term 1935 & 1936, 51 Harv. L. Rev. 577, 616, n. 69."

(b) Petitioner voluntarily waived his plea to the jurisdiction of the trial court (see judgment of the trial court, App. A, pp. 1a-3a Petitioner's Petition for Writ of Certiorari).

(c) Petitioner voluntarily withdrew from consideration by the trial court his motion for new trial in which he claimed the trial court lacked jurisdiction to try the case (see App. A, B and D infra).

(d) Petitioner failed to file his notice of appeal within the proper time. His first notice of appeal, filed July 14, 1961 (App. C infra), was filed while his motion for new trial was pending and was, therefore, premature and nugatory as hereinabove shown. His second notice of appeal, filed July 24, 1961 (App. E infra), was not filed within thirty days from entry of the judgment June 16, 1961, as required by Rule 73(a) of the Rules of Civil Procedure as hereinabove shown.

> "The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal."

(e) Petitioner failed to file the record within forty days after he filed, on July 14, 1961, his first notice of appeal (App. C infra), as required by Rule 73(g) of the Federal Rules of Civil Procedure; and, if he has any excuse, such excuse should be given to that Court (see Petitioner's statement under the heading "Jurisdiction" p. 2 his Petition for Writ of Certiorari in which he states "Appeal was * * * docketed therein [Court of Appeals] on August 24, 1961 [Tr. pp. i, 193, 197]). Pertinent portions of Rule 73(g) provide:

It is thus demonstrable that (1) the case really does not merit in importance resort to the sparingly-used procedure of granting Writ of Certiorari before the Court of Appeals has

rendered judgment; (2) Petitioner's own conduct in studiously withholding any challenge to the jurisdiction from proper consideration by the trial court does not deserve to be thus rewarded; and (3) Petitioner's failures to properly perfect the appeal to the Court of Appeals are matters which logically call for consideration and decision first by that Court.

THIRD COUNTERPOINT—(Restated)

Federal jurisdiction exists in this case because the amount in controversy is properly governed by the allegations of the Respondent's complaint rather than by Petitioner's counterclaim.

STATEMENT UNDER THIRD COUNTERPOINT

In its complaint filed in the Federal District Court, Respondent alleged that Petitioner's claim before the Texas Board recited:

> "I was operating maintainer blading roads and a piece of cable wrapped around the blade of the maintainer. I dismounted from the cab and caught hold of the piece of cable to jerk it off the blade and felt a severe pain in my back between the 4th and 5th vertibrae."

and that his average weekly wage was $90. Respondent further alleged in its complaint that more than $10,000, exclusive of interest and costs, was the amount in controversy (Tr. pp. 2-4). As shown by the judgment, Petitioner waived his plea to the jurisdiction of the Court (Tr. pp. 181-182). Petitioner voluntarily withdrew his challenge to the jurisdiction of the court, which he again asserted in his motion for new trial, when he voluntarily had the motion withdrawn (App.'s A, B and D infra).

ARGUMENT AND AUTHORITIES UNDER THIRD COUNTERPOINT

Under *Article 8306, Sec. 10* (App. F infra) and in view of the claim he filed with the Board, Petitioner had a right to claim, and Respondent was exposed to, a potential loss of $14,035. *Booth v. Texas Employers, 123 S. W. 2d 322 (opinion adopted by the Supreme Court of Texas).* In the complaint which Respondent filed in the Federal District Court, it sought to be relieved of this potential loss of $14,035.

This Court in *Horton v. Liberty Mut. Ins. Co., 6 L. Ed. 2d 890, 894,* said:

> "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal'."

In the *Horton* case, this Court went on to say that there was *no* showing "* * * let alone a showing 'to a legal certainty' of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy." *Horton v. Liberty Mutual,* supra, at page 894. This rule that the amount in controversy is to be determined from the complaint and the good faith thereof, is based on *St. Paul Merc. Indemnity Co. v. Red Cab Co., 303 U. S. 283, 82 L. Ed. 845, 58 S. Ct. 586; Bell v. Preferred Life Assur. Society, 320 U. S. 238, 88 L. Ed. 15, 64 S. Ct. 5;* and *Aetna Casualty & Sur. Co. v. Flowers, 330 U. S. 464, 91 L. Ed. 1024, 67 S. Ct. 798,* and the many cases cited therein.

Despite the plain language in the *Horton* case adopting the rule established in the *Red Cab* and *Bell* cases, Petitioner misinterprets the *Horton* case and at page 8 of his Petition for Writ of Certiorari states:

> "This Court in Horton v. Liberty Mutual Ins. Co., 367 U. S. 348, permitted a plaintiff to affix jurisdiction by correctly prophesying what the defendant would seek under his counterclaim. In effect, the naked allegation of jurisdictional amount *suspends* the determination of federal jurisdiction until the defendant affirmatively reveals the amount he seeks under his counterclaim. The *Horton* case goes no further."

Based upon this misconstruction of the *Horton* case, the Petitioner concludes regarding the case at bar:

> "The foible of tentatively predicating jurisdictional amount on a conjectural sum that the defendant may claim is well illustrated here."

In this manner, the Petitioner creates the very evil he thereafter assails. This Court has not before placed its jurisdiction at the whim and caprice of the defendant in a federal court, and it plainly did not do so in *Horton*. Such maneuvers have been attempted in other cases of various types. Two of such attempts were dealt with in the *Red Cab* case. Regarding the reduction of his claim by a state court, plaintiff, after removal to the Federal Court by the state court defendant, in an effort to defeat federal jurisdiction, this Court said in *Red Cab*, supra, at page 294, U. S.:

> "We think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat Federal jurisdiction the defendant's supposed statutory right of removal would

be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the Federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

"This view is further supported by the authorities as to causes in which jurisdiction depends on diversity of citizenship. It uniformly has been held that in a suit properly begun in the Federal court the change of citizenship of a party does not oust the jurisdiction."

The comments in the *Red Cab* case illustrate the sound reasoning behind the rule set forth at page 289 therein that "events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." Chief Justice Marshall in *Mollar v. Toran, 9 Wheat. 537, 539, 6 L. Ed. 154, 155*, said, "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events". So well established is this rule that even if the pleadings indicate a valid defense to the claim, federal jurisdiction is not defeated. *St. Paul v. Red Cab, at p. 289.* In fact, where the complaint as filed in the state court states an amount in controversy sufficient to confer jurisdiction upon the federal court and after removal to the federal court the complaint is dismissed, the Federal Court, nevertheless, retains jurisdiction of a counterclaim below the jurisdictional amount. *Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 L. Ed. 911*, and cases cited therein.

The majority of the court in *Horton* founded its opinion squarely upon the *Red Cab* case and was certainly aware of the reasoning contained therein that federal jurisdiction should not be left to the capricious reduction of his claim by the plaintiff. It, therefore, seems inconceivable that the majority of the court in *Horton* could have intended to create a practice in workmen's compensation cases similar to that criticized in the *Red Cab* case as claimed by Petitioner. If federal jurisdiction is based on the counterclaim, then as a practical matter it can always be defeated by the defendant's reduction of his counterclaim; and the defendant can return to the state court and file suit, or amend his pleadings, and seek recovery for the full $14,035.

Undoubtedly, Petitioner's statements regarding "tentative federal jurisdiction" arise from the minority opinion of the court in *Horton*, stating:

> "It seems impossible to avoid the conclusion that the court is allowing diversity jurisdiction to be predicated upon a counterclaim which might possibly be filed by Petitioner." (Opinion p. 897 L. Ed.)

The error in this is that the insurer in that case did not sue only to be relieved from a possible counterclaim (although one was sure to be filed); rather, it sued to be relieved from a potential maximum liability of $14,035 which then existed *whether or not* a counterclaim was filed in that action. In the case at bar, no reference whatsoever was made to a counterclaim in Respondent's complaint, but Respondent alleged that the amount of the claim could be definitely determined and that the amount in controversy exceeded $10,000, exclusive of interest and costs. General allegations that the amount in

controversy exceeds the jurisdictional minimum have been held in many cases to be sufficient to affix jurisdiction. *Gibbs v. Buck, 307 U. S. 66, 83 L. Ed. 1111; Packard v. Banton, 264 U. S. 140, 142, 68 L. Ed. 596, 607; City of Memphis, Tenn. v. Ingram, 195 F. 2d 338.*

It is apparent that Respondent did not file suit merely to be relieved from a potential counterclaim. Respondent sued to be relieved of a maximum potential liability of $14,035, regardless of any counterclaimed amount. It seems clear that the majority opinion in *Horton* determined the amount in controversy in the same manner—based upon the maximum potential liability of the insurer, from which insurer sought to be relieved.

Countless cases have been decided by the federal courts in which a party sued to be relieved of an obligation or burden of some nature, e.g., a tax, regulation by statute, or potential liability under an insurance policy. These cases have uniformly held that the maximum potential liability to the party seeking relief fixes the amount in controversy. When statutory regulation is sought to be enjoined, jurisdiction is to be tested by the value of the right to be free from the interference of the statute. *Gibbs v. Buck*, supra; *Packard v. Banton*, supra; *City of Memphis, Tenn. v. Ingram*, supra.

When suit is brought by an insurance company in a federal court to rescind a policy, to declare its rights thereunder, or to enjoin a state court proceeding, the amount in controversy is the maximum potential liability of the company. *Ballard v. Mutual Life Ins. Co. of N. Y., 109 F. 2d 388; Mutual Benefit*

Health & Acc. Assoc. v. Fortenberry, 98 F. 2d 570; Hartford Acc. & Indem. Co. v. Northwest Nat. Bank, 228 F. 2d 391. In *N. Y. Life Ins. Co. v. Swift, 38 F. 2d 175, 176,* the court said:

> "In a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount; in other words, the value of the right to be protected."

Similarly, in *Commercial Cas. Co. v. Humphrey, 13 F. Supp. 174, 178,* a Texas district court stated that the test of jurisdiction was "the maximum amount for which plaintiff may be liable under the policy."

Regarding Texas workmen's compensation claims, it has been held by the Fifth Circuit that the amount in controversy "*is the largest amount that could be recovered under the claim*" (Emphasis added). *General Acc. Fire & Assur. Corp. v. Mostert, 131 F. 2d 596 (5 Cir. 1942).* The Supreme Court of the United States has said in a workmen's compensation case:

> "Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction."
>
> *Aetna Casualty & Surety Co. v. Flowers, 330 U. S. 464, 67 S. Ct. 798, 91 L. Ed. 1024, 1027.*

The merits of this simple method of determining the amount in controversy where relief is sought from an obligation or burden have been proved by years of continuous use and should not now be discarded in favor of a rule which

would place federal jurisdiction at the option of the defendant. To do so would generate uncertainty not only in workmen's compensation cases but also in cases wherein a complaint is filed seeking relief from some other type of obligation. The court in *Horton* did not base its opinion on what the defendant might do, or, in fact, did do, but based it upon the established principles set forth in the *Red Cab* and *Bell* cases. These principles should not now be abandoned.

Petitioner asserts that the upholding of federal jurisdiction in this case is contrary to the decision of this court in *McNutt v. General Motors Acceptance Corp. of Ind., 298 U. S. 178, 80 L. Ed. 1135.* The predicate for the alleged conflict is laid in Petitioner's STATEMENT to the effect that: "Although the Petitioner—employee challenged the jurisdiction of the federal court and denied that the amount in controversy exceeded $10,000 exclusive of interest and costs, trial proceeded in federal court * * *." Petitioner then asserts at page 7 of his Petition that "The Respondent insurer's form book allegation that the amount in controversy exceeded $10,000 was denied by the Petitioner. There is not one shred of evidence in the entire record to support the Respondent's allegation. The upholding of jurisdiction is in direct conflict with McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 190."

To set the record straight, Petitioner did file a motion and pleading seeking a dismissal of Respondent's suit for want of jurisdiction; however, he then *expressly waived* his objections to the jurisdiction in order that he could proceed to trial (Judgment, App. A, pp. 1a-3a, Petitioner's Petition for Writ

of Certiorari).[2] This waiver immediately distinguishes the *McNutt* case. There, the plaintiff sought an injunction to prevent the enforcement of a state statute regulating "finance charges" made upon the purchase of installment sales contracts. The defendant *denied* that the necessary jurisdictional amount was in controversy and the plaintiff's only evidence was the net worth of his business in Indiana—not the loss he would suffer under the statute. The court said:

> "The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. *The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business *throw no light upon that subject.* They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegations as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. *That allegation was put in issue* and the record discloses neither finding nor evidence to sustain it." (Emphasis added.)

As the record in this case plainly shows, Petitioner not only waived any challenge of the allegations in the Complaint as to jurisdiction, but he also withdrew any objections after the trial. He now desires to go into these matters for the first time before the Supreme Court of the United States.

---

[2]Petitioner was unable to obtain a trial setting in the state court as rapidly as in the federal court.

Even though Petitioner did not call upon Respondent to produce it, there is evidence in the record upholding juristion. Respondent's complaint clearly shows the nature of the claim which Petitioner presented to the Industrial Accident Board. Such a claim, under the Texas cases, can be given a monetary value of $14,035 because it will support a judgment for that amount. At the time Respondent filed its suit, there was not one shred of evidence that Petitioner would claim anything less. Actually Petitioner is again attempting to direct the Court's attention to the counterclaim and away from the complaint and the good faith allegations therein. He bases his argument that there is no evidence to support the complaint on the fact that he later chose to assert less than $10,000 in his counterclaim. This is not the test set forth in *Red Cab, Bell & Horton.* Federal jurisdiction is to be based on the allegations in the complaint and Petitioner must challenge and disprove the good faith thereof.

The procedure Petitioner should have followed to challenge the allegations in the complaint is set out in *Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 784:*

> "Such a rule (that a valid defense in diminution of the amount claimed does not necessarily diminish the amount that is or may be claimed in good faith by the Plaintiff), does not contravene another well settled rule that the court has the power to determine in every case whether the prerequisites to jurisdiction in fact exist and such jurisdictional issues are properly triable to the court prior to a trial on the merits. Rule 12(b) and (d), Rules of Civil Procedure, 28 U.S.C.A. The manner in which such a determination should be made is left to the trial court. *Gibbs v. Buck,* 307 U. S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111. The court may inquire by

> affidavits or otherwise into the facts as they exist. It is not, however, a hearing upon the merits. *Land v. Dollar*, 330 U. S. 731, 735, note 4, 67 S. Ct. 1009, 91 L. Ed. 1209."

It must be shown to a legal certainty that the allegations were not made in good faith. *Horton v. Liberty Mut. Ins. Co.*, supra. The Respondent is well aware of the fact that the lack of jurisdiction cannot be waived by any one or both of the parties, but an inquiry into the matter of good faith is a question of fact which is for the trial court, like other questions of fact.[5] The issue on an appeal involving the determination of a jurisdictional fact is whether or not there is sufficient evidence to uphold the trial court's judgment on that point. *Digby v. U.S.F. & G. Co. (5th Cir. 1957), 239 F. 2d 569, 572.* The court there said in such a case at page 572:

> "It being our function not to retry this issue on the facts, but only to determine whether the court's holding was clearly erroneous, we must affirm judgment of the trial court."

There is not a scintilla of evidence in the record to detract from Respondent's good faith. Respondent knew that its maximum potential liability was $14,035, and the cases are legion that this is the correct basis for determining federal jurisdiction when a complainant seeks relief from an obligation or burden. What Petitioner elected to place in his counterclaim should not be substituted as the basis for determining the good faith of the allegations contained in the complaint.

[5]The trial judge is able to receive testimony, such as correspondence which may have taken place between the parties, and is able to examine various kinds of evidence, e.g., medical testimony. He is also familiar with the local law and the practices thereunder and is thus better able to determine a jurisdictional fact than any other court.

A fortiori, the Petitioner should not be allowed to circumvent the trial court and try the issue of good faith for the first time in an appellate court—in this instance, the United States Supreme Court. The upholding of jurisdiction in this suit does not conflict with *McNutt* or the other cases establishing the rules for determining jurisdiction; but, in fact, such action is in complete accord with *Red Cab*, *Bell* and *Horton*.

At page 9 of the Petition for Writ of Certiorari, Petitioner argues that the federal abstention doctrine as set forth in *Meredith v. City of Winter Haven, 320 U. S. 228*, should be applied to this case. After demanding and receiving a jury trial in the Federal District Court and not being satisfied with the judgment obtained, Petitioner now seeks federal court abstention. The doctrine of abstention as enunciated in Meredith, page 235, is an appeal to the discretionary powers of the court, the exercise of which relates to "* * * the equitable jurisdiction conferred on federal district courts * * *." Petitioner's position can have no appeal to a court of equity. Furthermore, as an equitable doctrine, it is not appropriate in the case of a statutory proceeding such as a workmen's compensation case and as far as is known, has never been applied to a workmen's compensation case. Congress, after full consideration, has not seen fit to deny federal jurisdiction in workmen's compensation cases, as properly held in Horton.

CONCLUSION

The Petition for a Writ of Certiorari should be denied because: (a) the appeal to the Court of Appeals was not properly perfected, (b) the Petition is untimely in that there are procedural questions raised by the record which properly should first be considered by the Court of Appeals, and (c) there are good faith allegations in the complaint, and an untraversed showing that at the time the complaint was filed more than $10,000, exclusive of interest and costs, was the amount in controversy. The decision in Horton is correct, it is controlling in the case at bar, and should be left undisturbed.

Respectfully submitted,

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Dallas 1, Texas,

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By .....

Attorneys for Respondent.

This is to certify that a true copy of the foregoing brief has been served upon Petitioner's counsel, William VanDercreek, 3315 Daniels, Dallas 5, Texas, and Jack Gay and Marvin Jones, Jones, Phillips & Watkins, 1714 Life Building, Dallas, Texas, by depositing the same in the United States mail with first-class postage properly addressed.

Reo Knowles

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APPENDIX A

Motion for New Trial Filed by Petitioner in the United States District Court for the Northern District of Texas on June 23, 1961

(Heading Omitted)

MOTION FOR NEW TRIAL

To the Honorable Judge of Said Court:

Now comes defendant and cross-plaintiff, Horace Hart, and files this, his motion for new trial, and moves the court to set aside the judgment heretofore entered in the above entitled and numbered cause, and would show to the court:

1.

The verdict and judgment are contrary to the evidence, in that the evidence showed the cross-plaintiff either has permanent disability or has none; that by the verdict of the jury and in accordance with the judgment of the court the defendant had partial disability which expired at the end of 79 weeks; that there was not even a scintilla of evidence to support temporary partial disability.

2.

That the court erred in submitting cross-defendant's Special Requested Charge No. One over cross-plaintiff's objection, for the reason that it conflicted with the charge already prepared and submitted by the court, and further it advised the jury of the effect of their answer, all of which is evidenced

by a certain note submitted to the court by the foreman of the jury in which he inquired as to the reason for being required to answer the said special charge and what effect the answer would have on any award given cross-plaintiff.

3.

That the court was without jurisdiction of this cause for the reason that the amount in controversy was less than $10,000.00 as required by Title 28, Section 1332, United States Code Annotated as amended by Public Law 85-554, July 25, 1958.

4.

The court erred in overruling cross-plaintiff's objection to the submission of cross-defendant's requested definition of partial disability for the reason that said definition is contrary to the law, in that in arriving at the amount of disability the jury may consider the fact that cross-plaintiff could procure and retain employment of a type for which he has no skill or training; further, that he may be able to perform labor of a less remunerative class; that said definition does not reflect the true measure of loss of earning capacity as required by Texas Revised Statutes, Article 8306, Section 11.

5.

That the court erred in explaining to the jury the method by which the amount of a workmen's compensation award is determined.

6.

That the court erred in allowing the motion pictures to be shown to the jury over cross-plaintiff's objection, for the reason that said pictures did not show the cross-plaintiff doing anything contrary to the evidence in the case; that said motion pictures did not show cross-plaintiff performing the duties of his employment or any of the usual tasks of a workman; that the cross-plaintiff was surprised by the use of said motion pictures; that he had not been apprised that motion pictures would be used; that allowing cross-plaintiff to view said motion pictures at approximately 4:00 P.M. and showing them to the jury at approximately 10:00 A.M. the next day did not allow cross-plaintiff sufficient time to prepare a defense.

7.

The court erred in failing to submit to the jury an instruction as a part of the court's charge that the cross-plaintiff, Horace Hart, could be disabled as defined by the Workmen's Compensation law even though, by reason of economic necessity he had worked as an employee during such period of disability.

8.

That the jury failed and refused to consider all of the charge given to them by the court, in that the foreman refused to take all of the court's charge into the jury room for consideration of the jury, and the charge not taken was an instruction that the cross-plaintiff, Horace Hart, could be disabled as defined by the Workmen's Compensation law,

even though, by reason of economic necessity, he had worked as an employee during such period of disability.

9.

That in awarding 11 weeks of total disability and 68 weeks of partial disability, the jury did not determine such disability based upon the evidence in the case but based upon speculation of the jury not supported by any evidence; that the cross-plaintiff, Horace Hart, could not draw any payment for disability if he was employed during such period of disability; further, that if cross-plaintiff was awarded permanent disability as shown by the evidence he would be discharged by the cross-defendant and that it was more beneficial for the cross-plaintiff, in view of his 33⅓% disability, to continue his employment for the cross-defendant than to receive the compensation which the evidence indicated he was entitled to receive.

WHEREFORE, defendant and cross-plaintiff Horace Hart prays that this motion for new trial be granted, and that the defendant and cross-plaintiff be granted a new trial herein, that the judgment of the court heretofore received herein be set aside and held for nought, and that this defendant and cross-plaintiff be awarded a new trial.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY, of Counsel,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed June 23, 1961)

APPENDIX B

Petitioner's Application to the Trial Court to Withdraw His Motion for New Trial Filed July 15, 1961

(Heading Omitted)

APPLICATION

To the Honorable Judge of Said Court:

Now comes Horace Hart, defendant and cross-plaintiff in the above entitled and numbered cause, and files this his application to withdraw his motion for new trial heretofore filed herein.

WHEREFORE, premises considered, defendant and cross-plaintiff prays that the court order his motion for new trial withdrawn.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY, of Counsel,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed July 14, 1961)

APPENDIX C

Petitioner's First Notice of Appeal Filed in the Trial Court on July 14, 1961

(Heading Omitted)

NOTICE OF APPEAL

To the Honorable Judge of Said Court:

Notice is hereby given that Horace Hart, defendant above named, hereby appeals to the United States Court of Civil Appeals for the Fifth Circuit from the final judgment entered in this action on June 16, 1961.

Dated July 14, 1961.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY, of Counsel,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed July 14, 1961)

APPENDIX D

Order of the Trial Court Granting Petitioner's Motion to Withdraw Petitioner's Motion for New Trial and Ordering Withdrawal Thereof, Entered 19th Day of July, 1961

(Heading Omitted)

ORDER

On this day came on to be heard the motion of defendant and cross-plaintiff to withdraw his motion for new trial, and it appearing to the court that said motion should be granted;

IT IS HEREBY ORDERED that defendant's and cross-plaintiff's motion for new trial be and the same is hereby withdrawn for all purposes.

ENTERED this 19 day of July, 1961.

/s/ T. WHITFIELD DAVIDSON

JUDGE

APPENDIX E

Petitioner's Second Notice of Appeal Filed July 24, 1961

(Heading Omitted)

NOTICE OF APPEAL

Notice is hereby given that Horace Hart, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on June 16, 1961. The Defendant filed a timely motion for new trial on June 23, 1961. The motion for new trial was withdrawn by the Defendant on July 14, 1961, and a notice of appeal then filed. On July 21, 1961, the District Court entered an order approving the withdrawal of the motion for new trial.

Dated July 24, 1961.

JONES, PHILLIPS, BARNES & WATKINS,

By
JACK GAY,
Attorney for Defendant-Appellant,
1714 Life Bldg.,
Dallas, Texas RI 7-6262

(filed July 24, 1961)

APPENDIX F

Article 8306, Sec. 10, of Vernon's Texas Civil Statutes (Texas Workmen's Compensation Law)

TOTAL INCAPACITY

"Sec. 10. While the incapacity for work resulting from the injury is total, the association shall pay the insured employee a weekly compensation equal to sixty per cent (60%) of his average weekly wages, but not more than Thirty-Five Dollars ($35) nor less than Nine Dollars ($9) and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury (Acts 1957, effective September 1, 1957)."

APPENDIX G

Certificate of Reo Knowles as to Workmen's Compensation Cases Filed in United States District Court, Northern Districe of Texas, Dallas Division, from July 25, 1958, to August 31, 1961

This is to certify that the docket sheets for cases filed in the United States District Court for the Northern District of Texas, Dallas Division, during the period July 25, 1958, to August 31, 1961, were personally checked by counsel for Respondent and that only eleven (11) Workmen's Compensation Cases were found to have been filed in such Division of said Court by insurance companies during said period and that only eleven (11) such cases were filed by employees in such Division of said Court during this time.

/s/ REO KNOWLES

Reo Knowles

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 372

HORACE HART,

Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

REPLY MEMORANDUM FOR PETITIONER

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September, 1961

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 372

HORACE HART,

Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

REPLY MEMORANDUM FOR PETITIONER

Petitioner respectfully believes the arguments raised by Respondent to oppose the granting of certiorari are without merit. To aid this Court in determining whether to grant the writ, the Petitioner will briefly state the basis for his belief.

A. The Appeal to the Fifth Circuit was Duly Perfected.

In an unmeritorious effort to discourage the granting of certiorari, Respondent denies that the jurisdictional notice of appeal was timely filed. Respondent arrives at this conclusion through the device of taking mutually inconsistent positions.

The sequence of events is set out in the Second Notice of Appeal.

1. June 16, 1961, entry of final judgment.

2. June 23, 1961, Petitioner's Motion for New Trial.

3. July 14, 1961, Application to Withdraw Motion for New Trial.

4. July 14, 1961, First Notice of Appeal.

5. July 19, 1961, Order Granting Withdrawal of Motion for New Trial.

6. July 24, 1961, Second Notice of Appeal.

Petitioner agrees with Respondent that the filing of the timely motion for new trial suspends the time for filing the Notice of Appeal. Thus, regardless of whether the withdrawal of the motion for new trial commences the appeal time to run from the date filed or from the date the trial court acts, the Second Notice of Appeal was timely. If the filing of withdrawal of the motion for new trial could somehow retroactively affect the suspension of the time for appeal, then the First Notice of Appeal (filed subsequent to the withdrawal) is timely.

Under Respondent's theory the filing of the first Notice of Appeal was a nullity because the motion for new trial *continued to exist* after the filing of the withdrawal, and then, contradictorily, Respondent asserts that the second Notice of Appeal was untimely because the motion for new trial in effect *never existed*. Under the divergent constructions of the federal rules put forth by the Respondent it would be *impossible* to give a timely Notice of Appeal in the instant case. Surely Respondent should not be rewarded for such incon-

sistency. More importantly Respondent's novel construction does not comport with the requirement in Rule 1 that the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Respondent cites some 18 cases; the *holding* of not one case concurs with Respondent's conclusion.

B. Lack of Federal Jurisdictional Amount was Presented to the District Court.

Contrary to assertions throughout the Respondent's brief, the district court had full and ample opportunity to sustain Petitioner's position for over a year; from July 18, 1960 (Motion to Dismiss), through July 19, 1961 (order entered approving withdrawal of Motion for New Trial). Any time during this period the district court had the power, and indeed the duty,[1] to dismiss for want of the jurisdictional amount.

Petitioner withdrew his motion for a new trial because he decided to prosecute only his jurisdictional objections on appeal. Counsel for the Respondent had been previously informed that Petitioner would seek review by the Supreme Court. The District Judge knew when he acted on the motion for new trial that the Petitioner intended to appeal. The reason for the appeal is simple: Petitioner lost on his jurisdictional argument in the District Court.

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[1] E.g., *Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379; American Fire & Cas. Co. v. Finn, 341 U. S. 6.*

C. Petitioners Consent to Trial in Federal Court Did Not Waive any Jurisdictional Defects nor Impair the Conflict with McNutt v. General Motors Accept. Corp., 298 U. S. 178.

The Defendant-Petitioner's consent to trial in federal court was about as freely given as the marriage vows to a shotgun wedding. He had virtually no choice. Respondent states "Petitioner was unable to obtain a trial setting in the state court as rapidly as in the federal court." (Respondent's Brief, p. 21, n 2). The statement is a cruel half-truth. Petitioner could not get his case tried in state court because of the *Respondent's plea in abatement.* (See Appendix E, Petition for Certiorari.) Petitioner *still* is unable to try his suit in state court because of the Respondent's plea in abatement. The injured workman surely should not be penalized for accepting a federal trial as against no trial.

Although the Petitioner consented to the exercise of Federal jurisdiction,[2] the Petitioner did not amend his answer which expressly denies Respondent's allegation of jurisdiction. It was the Respondent who has invoked federal jurisdiction and who, under the *McNutt v. General Motors Accept. Corp., 298 U. S. 178,* has the burden to show federal jurisdiction. And the Respondent, in spite of much verbage to the contrary, has failed to point to any place in the entire record where the Petitioner at any time during the pendency of the federal district court suit ever claimed more than $6,310. True, the

[2]Federal Jurisdiction can not be waived, see cases n 1, *supra.*

Petitioner extra-judicially told the Accident Board he hurt his back—but he never claimed any specific sum of money. Moreover, this Court stated that the amount originally claimed before the Accident Board is not controlling for *federal* jurisdiction. *Horton v. Liberty Mutual Ins. Co.*, 367 U. S. 348 at 353.

D. Petitioner is Entitled to Present the Abstension Question.

Respondent's contention that the Petitioner is not entitled to present the question of federal abstension is not supported by any authority. Indeed, it is contrary to *Chicago, B. & Q. RR. v. North Kansas City*, 276 F. 2d 932 (8th Cir. 1960). The Eighth Circuit *held* that even the party who invoked federal jurisdiction (through removal) and who lost on the merits was entitled to initially raise the abstention doctrine at the appellate level.

E. This Case Will Determine Whether the Federal District Courts must Entertain Jurisdiction Over Hundreds of Compensation Suits.

Respondent would have this Court believe that although the compensation-insurers took the time and effort to remove compensation cases at the rate of some 1100 a year in Texas alone; that the insurers will not now engage in races to the forum. Considering the Respondent's own race, we submit his views should be treated with some suspicion.

The reason for the drop in compensation cases following the 1958 amendments is because of such rulings by the district courts as reported in *National Surety Corporation v. Chamberlain, 171 F. Supp. 591 (N. D. Tex. 1959)*—a result which may be short-lived in view of *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348.* (Respondent cites statistics from but one division—there are seven divisions in the Northern District of Texas and four Districts in Texas.)

The present *Hart* case will open the sluice gates of federal jurisdiction even more extensively than *Horton.* Under Respondent's position the injured employee who files with the Industrial Accident Board a claim that merely describes the nature of his injury, *irrevocably* has given the insurer the right to claim the eixstence of federal jurisdictional amount. A substantial number of the 60,000 plus claims annually filed with the Board are similar in form to Hart's.

Respondent's solicitous concern for this Court in urging that certiorari be denied is not reflected in its desire to inundate the inferior federal courts with hundreds of such cases. Besides these compensation suits, the decision by this Court will effect all forms of litigation where jurisdictional amount is at issue. Thus, Petitioner respectfully submits that the instant case will directly effect a more substantial number of cases than perhaps any case this Court has decided in the past five years.

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[3]See Petition for Certiorari, p. 6, n 3.

F. Declaratory Judgment Revisited.

To negate the impact that Respondent's cau of action is only to set aside a $910 award, the Respondent at page 18 of his Brief in Opposition makes the following ad mission: "Respondent sued to be relieved of a maximum po ntial liability of $14,035, regardless of any counterclaimed a mount." Once again a respondent-insurer seeks to uphold jurisdictional amount as though his action were a declara ry judgment proceeding. Respondent's complaint does not s pport such a theory. And necessarily, Respondent's suit eit r *is or is not* a declaratory judgment action. If it is, the Respondent should be given the opportunity to explain i race to the forum in view of the following statement by Professor Borchard, the father of the declaratory judgm nt act.

> "In several recent cases the federal c rts have declined to exercise jurisdiction over declara ry actions on the ground * * * that an unseemly scramb by attorneys to get into the federal court and avoid a state trial, which would be speedier, should be discou nanced. This exercise of discretion has seemed to some distinguished insurance lawyers as unauthorized by the statute or the law, and the reiterated statements of sev al courts that the grant of a declaratory judgment is di cretionary has been severely criticized.
>
> "But the courts are right and the c tics wrong." *Borchard, Declaratory Judgments* 312 (2d. ed. 1941.)

Finally, to sustain Respondent's position th the jurisdictional amount is present in its suit to set aside a $910 award because it "sued to be relieved of a maximum tential liability of $14,035, regardless of any countercla ned amount" would be tantamount to repealing the jurisdi ional statute.

CONCLUSION

The Petitioner and hundreds of other injured workmen need the help of this Court. In all humility they need that help now.

Respectfully submitted,

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